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FAX COVER SHEET

Date: 2/27/02 Pages, including cover page: 38

To:
Name: ANTITRUST DIVISION
Office Number: MICROSOFT SETTLEMENT
Phone Number:
Fax Number: 202-307-1454

From:
Name: RAMON PANTIN
Office Number: SEE ABOVE
Phone Number: "
Fax Number: "

Note:

Ramon G. Pantin

From: "Ramon G. Pantin" <rgp@scalio.com>
To: <microsoft.atr@usdoj.gov>
Cc: <rgp@veritas.com>
Sent: Sunday, January 27, 2002 11:59 PM
Attach: comments-040.html
Subject: Microsoft Settlement

Dear Department of Justice representative,

Attached is an HTML document with my comments about
the settlement proposed. I have included my background
and contact information in that document.

Please feel free to contact me at:
rgp@scalio.com
or at home at:
425-889-1043
if you have trouble with the attached documents.

Sincerily,
Ramon G. Pantin

Introduction

My name is Ramon G. Pantin, I have been in involved in commercial Operating System development since 1989. I have worked on the design and implementation of a large variety of Operating Systems and system software (operating system components) including chronologically:

- IBM's AIX 3.1, AIX 3.2, AIX 4.1 and AIX 5.x UNIX operating systems for their RS/6000 product line (recently renamed eServer pSeries) as a consultant.
- Tandem's NonStop UX UNIX operating system for fault tolerant systems (as an employee of Tandem Computers).
- IBM's now defunct WorkPlace OS desktop operating system (successor to their OS/2 product)) (as a consultant and later as an employee).
- Microsoft's Windows NT4.0 and Windows 2000 (employed by Microsoft).
- ICCOS (a now defunct operating system) (employed at TagoSoft, Inc.)
- FreeBSD UNIX operating system (at TagoSoft, Inc and consulting for Shawn Systems, Inc).
- SUN's Network Filesystem V3 for Windows NT (as a consultant)
- SUN's PC/SKIP product for Windows NT (as a consultant)
- Impactdata/Megadrive/Data Direct Networks CDNA shared storage SAN file system (as a consultant and later as an employee)
- At Scalio, Inc developping storage management software for both Windows 2000 and UNIX systems.
- IBM's AIX 5.x UNIX operating systems for their RS/6000 product line (recently renamed eServer pSeries) as a consultant to Veritas Software making changes to AIX as part of an IBM/Veritas relationship.

I have also taught operating systems design classes at Universidad Simon Bolivar (Venezuela) in 1989 and professional system software classes, both for UNIX and Windows NT.

I consider myself eminently well versed as a software enginner with 12 years of hands on operating system design and development.

The issues herein are of great importance to me and the industry that I am a participant of.

I appreciate the opportunity to comment about the proposed settlement.

Below is a long list of comments. Each comment's name is of the form "Comment X.Y" where X is the major section of the proposed settlement within which the commented terms are discussed, and Y is simply a sequential number of the comments that I have written and it is actually independent of the acutal comment numbering within the proposed settlement itself. Each comment includes the appropriate reference to text in question within the proposed settlement document.

I am available for comment and clarification in any and all issues hereing, preferrably thorugh email, please contact me at:

Ramon G. Pantin
rgp@scalio.com

or at:

Ramon G. Pantin
6119 114th AVE NE
Kirkland WA 98033

Sincerily,

Ramon Pantin
January 26th, 2002

Comment III.1

Section III.A reads:

> "A. Microsoft shall not retaliate against an OEM by altering Microsoft's commercial relations with that OEM, or by withholding newly introduced forms of non-monetary Consideration (including but not limited to new versions of existing forms of non-monetary Consideration) from that OEM, because it is known to Microsoft that the OEM is or is contemplating:"

There are 3 problems with this section:

1. It allows Microsoft to withhold *existing* forms of non-monetary Consideration, because it only prevents witholding *newly* introduced forms;
2. *Monetary* considerations are explicitly excluded, they shouldn't be excluded.
3. Microsoft *knowledge* is irrelevant and hard to establish, that text only contributes to the ambiguity of this section.

Section III.A should be not be constrained or qualified in these ways. It should be replaced with this text:

> A. Microsoft shall not retaliate against an OEM by altering Microsoft's commercial relations with that OEM, or by withholding any forms of Consideration from that OEM, because the OEM is or is contemplating:"

Comment III.2

Section III.A.1 reads:

> "1. developing, distributing, promoting, using, selling, or licensing any software that competes with Microsoft Platform Software or any product or service that distributes or promotes any Non-Microsoft Middleware;"

There are 2 problems in this section:

1. Microsoft in the past has retaliated against OEMs that market products that compete against Microsoft products, not just Microsoft Platform Software. For example, Microsoft retaliated

against IBM when IBM decided to pre-install its SmartSuite product (a product that competes directly with Microsoft Office) on its PCs, see Findings of Fact, paragraph 122 which reads: "... Then, on July 20, 1995, just three days after IBM announced its intention to pre-install SmartSuite on its PCs, a Microsoft executive informed his counterpart at the IBM PC Company that Microsoft was terminating further negotiations with IBM for a license to Windows 95. Microsoft also refused to release to the PC Company the Windows 95 "golden master" code. The PC Company needed the code for its product planning and development, and IBM executives knew that Microsoft had released it to IBM's OEM competitors on July 17. ..."

2. The words "any *software* that competes" allow for retaliation against the development, distribution, promotion, use, sell, or licensing of any *technology* that competes against Microsoft technologies. Examples of such technologies, include but are not limited to: technical standards, open or proprietary protocols, services, hardware products, etc.

Section III.A1 should be not be constrained or qualified in these ways. The existing Section III.A.1 should be left as part of the text and a new paragraph should be added to the list. Thus Section III.A.4 (a new paragraph) should be:

> "4. developing, distributing, promoting, using, selling, or licensing any technology or product that competes with any Microsoft product, technology or service;"

Comment III.3

Section III.A.2 reads:

> "2. shipping a Personal Computer that (a) includes both a Windows Operating System Product and a non-Microsoft Operating System, or (b) will boot with more than one Operating System; or"

Microsoft currently forbids OEMs, or it imposes Market Development Agreement penalities or it withholds Consideration from OEMs when they offer for sell Personal Computers without a Microsoft Operating System. Because of the earlier consent decree imposed on Microsoft, instead of requiring that every Personal Computer include a Microsoft Operatin System, Microsoft requires that for each model of Personal Computer offered by the OEM that each Personal Computer of that model be sold with a Microsoft Operating System. If this isn't done, Market Development Agreement penalties or Considerations are withheld from the OEM. Theoretically, the OEM is free to offer a model of Personal Computers for which it expects to sell such a high fraction of them without a Microsoft Operatin System, that offering them in that way doesn't cause harm or competitive disadvantage to the OEM. In reality, node of the models of Personal Computers are expected to sell in any large enough percentage without a Microsoft Operating System, thus the OEM ends up paying for a Microsoft Operating System for each Personal Computer for each model that it offers, thus it is forced to always pay for a Microsoft Operating System.

Microsoft, additionally requires that the end user of the Personal Computer accept a license agreement, and the it indicates that if the license agreement is not accepted, that the Microsoft Operating System product should not be used and that the Personal Computer manufacturer should be contacted for a refund.
Because of Microsoft per unit per model royalty imposition on the OEM, the OEM has no incentive to provide such a refund to the end user and these requests are largely ignored by the OEMs thus resulting in end users that desire to purchase a Personal Computer to pay for a softwarc licesnse for a

Microsoft Operating System, even if they never use such a software.

Given Microsoft's creativity in constraining OEMs in their business decisions, a broad based term should also be included. For example, Microsoft could technologically constraint the OEM from supporting non-Microsoft Operating Systems, for example by Microsoft imposing on the OEM technological standards that must be used in the Personal Computer design and because of intellectual property reasons the use of these standards prevent non-Microsoft Operating Systems from functioning on the Personal Computer (for example because Microsoft might have patents on the technology).

Section III.A.2 should be augmented with these subclauses to allow consumer to purchase Personal Computers without a Microsoft Operating System:

> "2. shipping a Personal Computer that (a) includes both a Windows Operating System Product and a non-Microsoft Operating System, or (b) will boot with more than one Operating System, or (c) does not include any Operating System of any kind, or (d) includes a Windows Operating System Product and provides for the removal of the Windows Operating System Product during the startup of the Personal Computer, as long as the Windows Operating System has not been used by the consumer, and allows for a refund to be issued to the comsumer for the price of the operating system, or (e) in any way supports or provides non-Microsoft Operating Systems; or"

Comment III.4

Section III.A by virtue of enumerating the activities that the OEM "is or is contemplating" allows Microsoft to retaliate for any activities not explicitly enumerated in this list (III.A.1, III.A.2, III.A.3, etc). A broad term should be added that prevents Microsoft from any other cause for retaliation. Section III.A.5 should be added (Section III.A.4 was proposed to be added above in Comment III.2):

> 5. engaging in any lawful activity by any means by itself or in cooperation with any party.

Comment III.5

Section III.A in the fith paragraph (the paragraph under III.A.3) reads in its last two sentences:

> "Microsoft shall not terminate a Covered OEM's license for a Windows Operating System Product without having first given the Covered OEM written notice of the reasons for the proposed termination and not less than thirty days' opportunity to cure. Notwithstanding the foregoing, Microsoft shall have no obligation to provide such a termination notice and opportunity to cure to any Covered OEM that has received two or more such notices during the term of its Windows Operating System Product license."

There are three problems with these sentences:

1. The time period of thirty days for cure is extremely short and would lead to unnecessary hardship on the OEM because of product distribution considerations (channel, distribution, resellers) that might require a constly product recall to be able to cure in thirty days. A period of at *least* 90 days is more appropriate. It is interesting to notice how terminating a Covered

OEMs license and thus putting the OEM immediately out of the Personal Computer business is codified into this consent decree, when any restraint on Microsoft's illegal monopolistic behaviour requires (so far) years of litigation and continued complaints about how "draconian" such measures are.

2. The non-obligation to provide a termination notice can be used by Microsoft as a means of retaliation by not enforcing contractual terms on some OEMs while enforcing them on others, thus easily allowing for just two such notices to cure to be used as retaliatory means. The number of notices should be a function of time, for example *2 notices per year* .
3. Microsoft should be required to enforce contractual terms in a non-discriminatory way across all OEMs, it should not be allowed to selectively enforce contractuals terms because it would provide an easy retaliatory tool against the OEMs. Additionally, Microsoft must show that if it makes efforts to enforce certain terms, then it must enforce all terms across all OEM with equal effort, dilligence and strength.
4. The notion of termination notices, per se, is problematic, because termination notices might not even correspond to actual OEM behaviour but to misunderstanding between the parties or Microsoft's desires for retaliation against the OEM. Any such termination notice should be submitted to the Technical Committee for technical consideration, the Microsoft Internal Compliance Officer, and to all the Plaintiffs; together with detailed documentation of the non-discriminatotry enforcement by Microsoft of these and any other contractual terms across all Covered OEMs. This communication is important because it ensures that the antitrues enforcement parties are involved from the start when any such notice is given.

Comment III.6

Section III.A, last paragraph reads:

> "Nothing in this provision shall prohibit Microsoft from providing Consideration to any OEM with respect to any Microsoft product or service where that Consideration is commensurate with the absolute level or amount of that OEM's development, distribution, promotion, or licensing of that Microsoft product or service."

These issues should be addressed:

1. Such Consideration should be offered to all Covered OEMs in a non-discriminatory basis.
2. The Consideration should be objectively measured according to established accounting practices.
3. The Technical Committee, the Microsoft Internal Compliance Officer, and all Plaintiffs should be informed and provided a copy of any and all such agreements and be allowed to requests additional documentation and conduct interviews related to the agreement.

Comment III.7

Section III.B, first paragraph reads:

> "B. Microsoft's provision of Windows Operating System Products to Covered OEMs shall be pursuant to uniform license agreements with uniform terms and conditions. Without limiting the foregoing, Microsoft shall charge each Covered OEM the applicable royalty for Windows Operating System Products as set forth on a schedule, to be established by Microsoft and published on a web site accessible to the Plaintiffs and

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all Covered OEMs, that provides for uniform royalties for Windows Operating System Products, except that:"

Issues:

1. In the first sentence, where it reads "... with uniform terms and conditions." it should read: ".... with uniform terms and conditions and Considerations." Considerations established outside or after the license agreement has been entered should be communicated to the OEMs in a uniform manner. All agreements and Considerations should be provided to the Technical Committe, the Microsoft Internal Compliance Officer, and all Plaintiffs and these parties must be allowed to requests additional documentation and conduct interviews related to the agreements and Considerations.
2. Microsoft in the past has discriminated against OEMs and other Personal Computer manufacturers (for example Apple) by threatening to not make Microsoft products available on those manufacturers computers, for example Microsoft Office cancellation for Apple's MacIntosh systems. Additionally, Microsoft has used the OEM prices of these non-Operating System products as a means to discriminate against OEMs. The prices and the offering of any Microsoft product to any Covered OEM for bundling with a Personal Computer should be non-discriminatory and subject to uniform license agreements.
3. Volume discounts of groups of Microsoft Operating System Products and Microsoft non-Operating System Products should not be allowed, because it might lead to exclusion from the market of products that competed against the Microsoft non-Operating System Products. For example, group discounts for a bundle of Microsoft Windows XP and Microsoft Office; or Microsoft Windows XP and Microsoft Word (or Microsoft Excell, etc); or Microsoft Windows XP and Microsoft Works; must not be allowed.

Comment III.8

Section III.C reads:

"C. Microsoft shall not restrict by agreement any OEM licensee from exercising any of the following options or alternatives:"

This should read:

C. Microsoft shall not restrict by agreement or any other means any OEM licensee from exercising any of the following options or alternatives:

For example, Microsoft could, through verbal or written communication, or through the quality of service that it provides the OEM restrict the OEM, or threaten the OEM from exercising the alternatives. Microsoft has in the past retaliated against OEMs, particularly IBM and Gateway, as is described in detail in the Findings of Fact through means other than agreements. For example by witholding IBM participation in marketting programs, or threatening Gateway with sofware audits.

Comment III.9

Section III.C.1 and others enumerate:

"icons, shortcuts, or menu entries"

this list should be:

> icons, shortcuts, folders, appliactions, explorer hierarchies or menu entries

Comment III.10

Section III.C.1 ends in "with respect to non-Microsoft and Microsoft products." This should be changed to read: ""with respect to non-Microsoft and Microsoft products or technologies that offer similar types of functionality." For example, the technology might be provided by a network service and not by a product installed in the Personal Computer, how the technology is provided should not be a reason for allowing Microsoft to retaliate or discriminate.

Comment III.11

In general, section III.C.1 and throughout the document, it is assumed that the only way to allow applications or software facilities to be used is through "icons, shortcuts, or menu entries", when in reality, applications/middleware can also be activated by associating it with particular types of data, and when such types of data are accessed, the application associated with it is activated. For example, when a file with a given extension is accessed, or when a URL is accessed over the internet, the type of the data is determined and the application associated with that type of data is activated. It is vital that such associations be allowed in a non-discriminatory basis between Microsoft and non-Microsoft technologies. For example, when a Internet audio URL is accessed, the media player associated with the data type is invoked to cause the audio to be decoded and played. It is not unsusual for multiple competing technologies, such as Microsoft Media Player, Real Networks and Apple's Quicktime media players to be capable of supporting the same data types, thus the preservation of the setting chosen by the user is important. Discrimination in this area has occurred in the past against both Apple's Quicktime and Real Network's Real Player.

The document should be updated throughout to take into account this form of application activation through data type and file name extension associations.

Comment III.12

Section III.C.2 reads:

> "2. Distributing or promoting Non-Microsoft Middleware by installing and displaying on the desktop shortcuts of any size or shape so long as such shortcuts do not impair the functionality of the user interface."

The term *shortcuts* should be replaced with *icons*, because many types of items can be shown on the desktop and these are not limited to shortcuts. For example, applications, files, folders, etc.

Comment III.13

Section III.C.3 reads:

> "3. Launching automatically, at the conclusion of the initial boot sequence or

subsequent boot sequences, or upon connections to or disconnections from the Internet, any Non-Microsoft Middleware if a Microsoft Middleware Product that provides similar functionality would otherwise be launched automatically at that time, provided that any such Non-Microsoft Middleware displays on the desktop no user interface or a user interface of similar size and shape to the user interface displayed by the corresponding Microsoft Middleware Product."

Issues:

1. The qualification: "if a Microsoft Middleware Product that provides similar functionality would otherwise be launched automatically at that time" is simply a form of restraint of trade. Microsoft usually doesn't lead in innovation, it follows, copies and bundles other's innovations into its products. It is unreasonable to require that Microsoft launch some software at a particular time to allow others to launch their software at that time. Usually some third party or OEM will developped these concepts and only later (much later sometimes) Microsoft will copy the concepts and include them in their versions of such functionality. The qualification should be removed.
2. The second qualification is also very unresonable, here Microsoft again thinks that it can dictate or retrain through its actions (or lack thereof) the innovations of others. The qualification reads: "provided that any such Non-Microsoft Middleware displays on the desktop no user interface or a user interface of similar size and shape to the user interface displayed by the corresponding Microsoft Middleware Product. " Again, it is ludicrous that competing ISVs or OEMs be reatrained to only mimic Microsoft's actions when usually innovation happens the other way around. This qualification should be removed. Why should microsoft care about the *size* of the user interface? If the OEM creates a user interface that is too small, or narrow, or large, it doesn't cause any harm to Microsoft, only to the OEM in user dissatisfaction and support costs (none of which are Microsoft's concern given that it doesn't bare any of those costs, and given Microsoft's treatment of Hewlett Packard with respect to startup sequnce shells, it has shown that it doesn't care about those OEM costs).
3. The qualification "if a Microsoft Middleware Product that provides similar functionality" also allows for Microsoft restraint of other's innovations, the definition of Microsoft Middleware Product is particularly weak and full of escape clauses. The qualification should not be present at all.
4. The time qualification and enumeration of the circumstances and times under which launching can occur "at the conclusion of the initial boot sequence or subsequent boot sequences, or upon connections to or disconnections from the Internet" should also be removed. There are many reasons why lounching might be desireable at other times.
5. Launching of should not be restricted to "Non-Microsoft Middleware", any software should be allowed to be launched.

Section III.C.3 should read:

3. Launching automatically, at the conclusion of the initial boot sequence or subsequent boot sequences, or upon connections to or disconnections from the Internet, or at any other time, any Non-Microsoft software is allowed without this being subject to any restraint from Microsoft. Mechanisms (APIs, Protocols, Facilities, etc) present in a Microsoft Operating System that aids launching of Microsoft software at particular times should be documented and allowed to be accessed by non-Microsoft software without restraint.

It should be noted that the original Section III.C.3 precludes the implementation of IAP sign up sequences, OEM shells, end user tutorials that are desired to be lounched at the initial and subsequent boot sequences. For example the OEM might present an IAP sign up sequence until such a time when the user as made such a selection or when the user as indicated that it doesn't want to asked again in subsequent sign up sequences. The reason the Section III.C.3 precludes even the implementation in the initial boot sequence is because Microsoft can remove their own facilities from startup or from displaying a user interface, thus forcing the OEM to remove their facilities. Freedom of innovation and choice by the OEMs cannot be at the mercy of Microsoft's actions. For example, Microsoft might move such facilities to the second boot sequence and it might require that the system reboot after an initial boot sequence process, the OEMs would then not have the freedom to provide their facilities in the second boot sequence.

Comment III.14

Section III.C.4 reads:

> "4. Offering users the option of launching other Operating Systems from the Basic Input/Output System or a non-Microsoft boot-loader or similar program that launches prior to the start of the Windows Operating System Product."

This section should be augmented in this way:

> 4. Offering users the option of (a) launching other Operating Systems from the Basic Input/Output System; or (b) launching other Operating Systems from a non-Microsoft boot-loader or similar program that launches prior to the start of the Windows Operating System Product.; or (c) choosing to make a non-Microsoft boot-loader the default boot loader in the system; or (d) choosing to allow the end user to interactively direct the Basic Input/Output System or a non-Microsoft boot-loader or any other facility to remove a Microsoft Windows Operating System and to provide the Personal Computer owner to receive a refund for the cost of the Microsoft Windows Operating System from the OEM; or (e) to select a default Operating System that is a non-Microsoft Operating System, for example by allowing the default Operating System to start without user intervention after a timeout period; or (f) any other form of restraint that might cause an OEM to not preload non-Microsoft Operating systems in their Personal Computers (for example by having the Microsoft Operating System corrupt the disk occupied used by such non-Microsoft Operating Systems, or from denying supprt to OEMs for such product configurations, etc)..

Given the nature of existing restraints by Microsoft in this area, these additional clauses allow for less restraint by Microsoft on the OEMs actions.

Comment III.15

Section III.D reads:

> "D. Starting at the earlier of the release of Service Pack 1 for Windows XP or 12 months after the submission of this Final Judgment to the Court, Microsoft shall disclose to ISVs, IHVs, IAPs, ICPs, and OEMs, for the sole purpose of interoperating with a

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> Windows Operating System Product, via the Microsoft Developer Network ("MSDN") or similar mechanisms, the APIs and related Documentation that are used by Microsoft Middleware to interoperate with a Windows Operating System Product. In the case of a new major version of Microsoft Middleware, the disclosures required by this Section III.D shall occur no later than the last major beta test release of that Microsoft Middleware. In the case of a new version of a Windows Operating System Product, the obligations imposed by this Section III.D shall occur in a Timely Manner."

Issues:

1. The text "via the Microsoft Developer Network ("MSDN") or similar mechanisms" allows Microsoft not to use the MSDN program which is broadly available and non-discriminatory, and allows instead for Microsoft to extract other agreements and conditions from the interested parties. The intent should by "via the Microsoft Developer Network ("MSDN") or successor developer program (if the MSDN program is discontinued or replaced by a new developer program, but such a program should be equally broadly available and equally non-discriminatory as the MSDN program was on the earliest date the proposed consent decree was filled with the Court by Microsoft and the Plaintiffs)."
2. The text "APIs and related Documentation" should be extended to include "APIs, related Documentation, Protocols, File Formats, Data Formats, Certification/Validation Component Signatures, and any other technological mechanism".
3. The text "that are used by Microsoft Middleware to interoperate with a Windows Operating System Product ", given the loose definition and the escape clauses that Microsoft can invoke in that definition, and given that Microsoft also markets a wide variety of non-Middleware software and hardware, the text should be corrected to require full disclosure of the use by these software and hardware products of Microsoft Operating System facilities. The proposed text is shown below.
4. The requirement that disclosure only occur in the case of a new major version of Microsoft Middleware allows Microsoft an easy exit from their documentation requirements. Microsoft has stated in fron of the District Court (Judge Jackson) that a sandwich would be part of the Operating System if they so dictated, clearly Microsoft cannot be trusted to name a release major or non-major, because to Microsoft it would be whatever they desire at such a time. Furthermore the mechanism of Major and first Minor point release numbers is highly ambiguous and maleable, certain Microsoft products don't even have a version number (Windows XP, Microsot .Net). In any case, whether a product release is major or minor should not be an excuse for non-diclosure, a small bug fix release wouldn't have many changes on interface use, so its documentation requirements would be proportional to the effort spent in the release development. If this restriction is not removed, facilities would remain undocumented, simply because Microsoft doesn't use them initially in their so called major release but instead only uses them initially in a minor release; or even more easily by making every release a minor release. Microsoft has shown in the earlier Consent Decree entered with the D.O.J. that it will take advantage in any ambiguity.

The new section should thus read:

> D. Starting at the earlier of the release of Service Pack 1 for Windows XP or 12 months after the submission of this Final Judgment to the Court, Microsoft shall disclose to ISVs, IHVs, IAPs, ICPs, and OEMs, for the sole purpose of interoperating with a Windows Operating System Product, via the Microsoft Developer Network

("MSDN") or successor developer program (if the MSDN program is discontinued or replaced by a new developer program, but such a program should be equally broadly available and equally non-discriminatory as the MSDN program was on the earliest date the proposed consent decree was filled with the Court by Microsoft and the Plaintiffs), the APIs, related Documentation, Protocols, File Formats, Data Formats, Certification/Validation Component Signatures (and Microsoft shall not restraint or deny such signature facilities or enablements), and any other technological mechanism that are used by Microsoft Middleware, Microsoft Application, Microsoft Hardware Products, or by newly introduced Microsoft Operating System features (that are similar to existing facilities available from third parties in the market) to interoperate with a Windows Operating System Product. In the case of a any new version of Microsoft Middleware or Microsoft Operating Systems, or Microsoft Application, the disclosures required by this Section III.D shall occur no later than the last major beta test release of that Microsoft Middleware. In the case of a new version of a Windows Operating System Product, the obligations imposed by this Section III.D shall occur in a Timely Manner.

Comment III.16

Section III.E should be augmented where it reads "on reasonable and non-discriminatory terms" to read "on reasonable, non-discriminatory and non-royalty bearing terms." The imposition of per unit royalties as a condition to grant access to any Communication Protocol would allow Microsoft to exclude competitors from the market.

Comment III.17

Section III.E reads:

> "E. Starting nine months after the submission of this proposed Final Judgment to the Court, Microsoft shall make available for use by third parties, for the sole purpose of interoperating with a Windows Operating System Product, on reasonable and non-discriminatory terms (consistent with Section III.I), any Communications Protocol that is, on or after the date this Final Judgment is submitted to the Court, (i) implemented in a Windows Operating System Product installed on a client computer, and (ii) used to interoperate natively (i.e., without the addition of software code to the client operating system product) with a Microsoft server operating system product."

There are many issues with this section:

1. Communication Protocols can be used for communication between two or more personal computers running a Windows Operating System Product installed on client computers. For example a client computer can share a disk drive so that its file are accessed to other client computers, such functionality doesn't require a Microsoft server operating system product. The ability to interoperate natively should not be restricted to the Communication Protocols used to interoperate natively with a Microsoft server operating system product, for example a competing non-server client operating system might require to implement these protocols to be competitive. For example, both Apple's MacOS X client operating system and client versions of the GNU/Linux operating systems contain incomplete implementations of the file sharing protocols used by Windows Operating System). Section III.E shall apply equally to both client

and server operating systems to allow them interoperate natively with Windows Operating System Products installed on client computers.

2. To circumvent the provisions in Section III.E Microsoft could do this in future (major or minor) releases of its Personal Computer Operating System Products: (a) do not include software that implements future revisions of a Communications Protocol with the Windows Operating System Product installed on a client computer; and (b) request from the Microsoft server operating system product the software that the client requies at first boot, each boot, or at under other circumstances. Thus Microsoft would have circumvented the requirements stated in Section III.E because there would be "addition of software code to the client operating system product" (which Section III.E.ii requires that it be "without the addition of software code to the client operating system product"). By Microsoft implementing a new protocol (which it would not have trouble documenting to 3rd parties) that the client computer's Windows Operating System Product would use to request these addional software codes from a Microsoft server operating system product the circumvention would have been achieved. Thus by removing the existing components that implement existing Communications Protocols all kinds of Communications Protocols would thus be allowed to remain undocument in future releases of a Windows Operating System Product by Microsoft, thus denying the purpose of allowing native interoperability between other operating systems and Windows Operating System Products. Microsoft, through privave key signin and public key signature validation, Microsoft would be able to sign these software components to ensure their origins (Microsoft) and that they have not ben tampered, thus allowing every Communications Protocols to remain undocumented, including security protocols, filesystem protocols, transaction management protocols, etc.The intent of Section III.E is good because it is pro-competitive, but the actual terms easily allow Microsoft to circumvent that intent. Software is very maleable, terms used to describe it, such as: "without the addition of software code" are easily circumvented, for example by slicing the software and requiring thatthere be "addition of software code", this can be done easily and transparently (i.e. without knowledge by end user).
3. The word "implemented" is also used to describe the software, and can lead to arguments or circumvention from Microsof with respect to meaning.
4. The description of what is being made available is ambiguous. Instead of "Microsoft shall make available ..., any Communications Protocol", it should be stated clearly what is being made available. A description of what should be made available is shown in the proposed revision to Section III.E below.

Section III.E should be replaced with:

> E. Starting nine months after the submission of this proposed Final Judgment to the Court, Microsoft shall make available for use by third parties, for the sole purpose of interoperating with a Windows Operating System Product, on reasonable (without an up front fee and royalty free) and non-discriminatory terms (consistent with Section III.I), technical implementations for any Communications Protocol that is, on or after the date this Final Judgment is submitted to the Court, utilized by a Windows Operating System Product nstalled on a client computer to interoperate with (i) a Microsoft server operating system product, or (ii) a Windows Operating System Product. The means through which any such Communications Protocol shall be made available shall include:
>
> > (a) a non-fee based and non-royalty based patent license to any and all patents required by an implementation of fully featured, high performance, and interoperable client or server operating

system product components that implement the Communication Protocols in question. The patent license can be limited to be for the sole purpose of interoperating with Windows Operating System Products installed on a client computers; and

(b) a non-fee based and non-royalty based license to implement the Communications Protocol in client and server operating system product components that are fully featured, high performance, and interoperable with Windows Operating System Products installed on a client computers. The protocol license can be limited to be for the sole purpose of interoperating with Windows Operating System Products installed on a client computers; and

(c) a technical discussion forum (mail list, newsgroup or web site) through which Microsoft will provide in a non-discriminatory basis non-fee based technical support to ISVs that require support related to the Communications Protocol. Microsoft shall make its best efforts to provide such technical support.

Microsoft shall provide subject to the Communication Protocol license the Communications Protocol specifications which shall be:

(d) the precise and complete set of specifications of the Communication Protocols (and their predecessors), such that based on it a competent third party software developper would be capable of implementing fully featured, high performance, and interoperable operating system product components that implement the Communication Protocols in question (without the need to perform any reverse engineering of any kind); or

In the abscence of such a precise and complete set of specifications as described in Section III.E.a (above), or at Microsoft's choosing or by direction of the Technicall Committee, Microsoft shall provide instead:

(e) any and all specifications that Microsoft has of the Communication Protocols (and their predecessors); and the complete source code and build procedures of all the relevant client side components and implementations (for each Microsoft Windows Operating System Product) of the Communications Protocol in a form that these components can be compiled (i.e. translated from source code form into binary form) and linked (translated from object form into a binary executable form) by the third party to produce the exact same binaries of the native components in the Windows Operating System Product that implement the Communication Protocols. The license under which these component's source codes and build procedures would be provided to the third party would be

only for reference and use only within the third parties premises for the sole purpose of implementing fully featured, high performance, and interoperable operating system product components that implement the Communications Protocol in question. No redistribution rights of any kind (in binary or source form) are required to be given to the third party.

Additionally:

(f) Microsoft shall continuously and proactively provide updates to the third party such that the third party can continue to implement fully featured, high performance, and interoperable operating system product components that implement the Communication Protocols in question as the corresponding Microsoft Windows Operating System Products implement new patents, versions or features of the Communications Protocol. These updates should be provided irrespective of how major or minor is the Microsoft Windows Operating System Product update that makes use of the Communications Protocol changes or patents. Microsoft shall provide these through addendums:

(i) to the licenses described in Sections III.E.a and III.E.b to cover new patents or protocol revisions or versions as appropriate; and
(ii) the specifications and implementations described or provided in Sections III.E.d and III.E.e as appropriate

Comment III.18

Section III.F.1.a reads:

"a. developing, using, distributing, promoting or supporting any software that competes with Microsoft Platform Software or any software that runs on any software that competes with Microsoft Platform Software, or"

Microsoft has shown that it retaliates against OEMs when they support non-Microsoft software in general, not just Microsoft Platform Software, for example the retaliation against IBM because of IBM's intent to bundle SmartSuite with their Personal Computers as can be seen in the Findings of Fact.

Section III.F.1.a should be expanded to read:

a. developing, using, distributing, promoting or supporting any software that competes with Microsoft Platform Software, Microsoft Operating Systems, Microsoft Application Software, Microsoft Hardware or any other Microsoft supported technologies or any software that runs on any software that competes with Microsoft Platform Software, Microsoft Operatin Systems, Microsoft Application Software, Microsoft Hardware or any other Microsoft supported technologies; or

Comment III.19

Section III.F.2 reads:

> "2. Microsoft shall not enter into any agreement relating to a Windows Operating System Product that conditions the grant of any Consideration on an ISV's refraining from developing, using, distributing, or promoting any software that competes with Microsoft Platform Software or any software that runs on any software that competes with Microsoft Platform Software, except that Microsoft may enter into agreements that place limitations on an ISV's development, use, distribution or promotion of any such software if those limitations are reasonably necessary to and of reasonable scope and duration in relation to a bona fide contractual obligation of the ISV to use, distribute or promote any Microsoft software or to develop software for, or in conjunction with, Microsoft."

Issues:

1. Again, Microsoft retaliates against OEMs (IBM) to product Microsoft products other than its Operating Systems.
2. Allowing Microsoft to enter into agreements that "place any limitations on ISV's development, use, distribution or promotion of any such software" is an open ended means under which Microsoft can cause ISV's to act in manners that Microsoft desires. For example, Microsoft might extend the MSDN agreements with limited sublicensing of Microsoft patent pools and extract in exchange agreements from all ISVs in the market to limit their development, use, distribution or promotion of any other software. The litigation to ensure that those limitations are not "reasonably necessary to and of reasonable scope" would probably take another 4 years of litigation. The Plaintiffs must remember that one of Microsoft's options at any time is to relly on the ambiguities of these terms and use them to realize their means, given that it has been shown that Microsoft has monopoly power int he x86 compatible Personal Computer market its retaliatory means must be reduced as much as possible.

Section III.F.2 should read:

> 2. Microsoft shall not enter into any agreement relating to a Windows Operating System Product, Microsoft Application Software, Microsoft Hardware or any other Microsoft supported technologies, that conditions the grant of any Consideration on an ISV's refraining from developing, using, distributing, or promoting any software that competes with Microsoft Platform Software, Microsoft Operatin Systems, Microsoft Application Software, Microsoft Hardware or any other Microsoft supported technologies or any software that runs on any software that competes with Microsoft Platform Software. Microsoft may not enter into any agreements that place limitations on an ISV's development, use, distribution or promotion of any such software for any reason.

Microsoft has more than enough resources to all the software development that it requires, if it has to relly on outside parties to do software development, it must do so without placing limitations.

Comment III.20

MTC-00029685_0017

Section III.G.1 reads:

> "G. Microsoft shall not enter into any agreement with:
> 1. any IAP, ICP, ISV, IHV or OEM that grants Consideration on the condition that such entity distributes, promotes, uses, or supports, exclusively or in a fixed percentage, any Microsoft Platform Software, except that Microsoft may enter into agreements in which such an entity agrees to distribute, promote, use or support Microsoft Platform Software in a fixed percentage whenever Microsoft in good faith obtains a representation that it is commercially practicable for the entity to provide equal or greater distribution, promotion, use or support for software that competes with Microsoft Platform Software, or"

These are the issues:

1. The text: "except that Microsoft may enter into agreements in which such an entity agrees to distribute, promote, use or support Microsoft Platform Software in a fixed percentage whenever Microsoft in good faith obtains a representation that it is commercially practicable for the entity to provide equal or greater distribution, promotion, use or support for software that competes with Microsoft Platform Software" allows Microsoft to extract agreements from these parties under which at least, by assuring itself of a 50% distribution, promotion or usage share it guarantees that no competitors technology can be bradly available on a large fraction of Personal Computers so that it can become a platform for cross-platform software. For example by ensuring that 50% of new Personal Computers don't include such software, Microsoft can ensure that such software doesn't obtain critical mass as a platform.
2. These kinds of allowances, given Microsoft's behavior, only serve to codify Microsoft's right to extinguish competition. It codifies the right and means through which Microsoft can cut other parties "air supply".
3. By restricting these terms to "Microsoft Platform Software" it allows Microsoft to enter other kinds of agreements in which the means to kill innovation and drive others off the market is by developping non-Platform Software, for example by developping Applications, giving them for free and forcing these parties to distribute them at 50% usage share.

The whole exception should be removed and Section III.G.1 should read:

> G. Microsoft shall not enter into any agreement with:
> 1. any IAP, ICP, ISV, IHV or OEM that grants Consideration on the condition that such entity distributes, promotes, uses, or supports, exclusively or in a fixed percentage, any Microsoft Platform Software, Microsoft Operatin Systems, Microsoft Application Software, Microsoft Hardware or any other Microsoft supported technologies, or

Furthermore, the agreement that Microsoft might enter might require that the OEM doesn't distribute certain non-Microsoft Sofware without actually requiring the distribution of Microsoft technologies. Thus a new clause should be added, Section III.G.3:

> 3. any IAP, ICP, ISV, IHV or OEM that grants Consideration on the condition that such entity refrains in any way or percentage from distributing, promoting, using, or supporting, any non-Microsoft software or technologies

Comment III.21

Section III.G.2 reads:

> "G. Microsoft shall not enter into any agreement with:
> ...
> 2. any IAP or ICP that grants placement on the desktop or elsewhere in any Windows Operating System Product to that IAP or ICP on the condition that the IAP or ICP refrain from distributing, promoting or using any software that competes with Microsoft Middleware."

Again the restriction is too narrow with respect to Microsoft's other means of distributing software, it should read:

> 2. any IAP or ICP that grants placement on the desktop or elsewhere in any Windows Operating System Product to that IAP or ICP on the condition that the IAP or ICP refrain from distributing, promoting or using any software that competes with Microsoft Middleware, Microsoft Platform Software, Microsoft Operatin Systems, Microsoft Application Software, Microsoft Hardware or any other Microsoft supported technologies

Comment III.22

Section III.G contains this, it is the second to last paragraph in the section:

> "Nothing in this section shall prohibit Microsoft from entering into (a) any bona fide joint venture or (b) any joint development or joint services arrangement with any ISV, IHV, IAP, ICP, or OEM for a new product, technology or service, or any material value-add to an existing product, technology or service, in which both Microsoft and the ISV, IHV, IAP, ICP, or OEM contribute significant developer or other resources, that prohibits such entity from competing with the object of the joint venture or other arrangement for a reasonable period of time."

Microsoft should be allowed to enter into these arrangements, but it should be allowed to require it to "prohibits such entity from competing with the object of the joint venture or other arrangement for a reasonable period of time.". Again, "reasonable period of time" is ambiguous and open ended, and non-compete clauses have no pro-competive role other than exclusionary when included in agreements by a Monopolist such as Microsoft. Joint development or joint services agreements should not be restricted in this manner. If an actual separate entity is formed, a joint venture that includes the incorporation or foundation of a separate independent legal entity, the entity in question could have non-competition restrictions placed on it, but not the shareholder companies themselves (i.e. Microsoft and the other party).

Comment III.23

Section III.G, last paragraph, reads:

> This Section does not apply to any agreements in which Microsoft licenses intellectual

property in from a third party.

This statement, is very ambiguous and unqualified. The meaning of "Microsoft licenses intellectual property in from a third party" could easily mean that Microsoft products that include any third party intellectual propery are exempt from the section. Most Microsoft products contain third party software, certainly its operating systems do (for example the Veritas/Seagate backup software and the Veritas Volume Manager included in both Windows XP and Windows 2000; the BSD software included in Windows 2000 and Windws XP; the Mosaic sofware included in all version of Internet Explorer; the Java software included in Windows 2000 and Windows XP; the printing drivers and other device drivers from IHVs included in Windows 2000 and Windows XP; the amount of software licensed into these products is very large; etc). Additionally, there can also be other forms of intellectual licenses that apply to these and other products (for example licenses to use patents of third parties). If the clause is intended to mean something different from my interpretation, please explain what it is intended to mean, and what terms in that sentence ensures that only that meaning is allowed.

This sentence should be removed completely from this section. Alternatively, a sentence that says:

> Where terms in this section would cause a third party who has licensed software or any other form of intellectual property to Microsoft to have its license agreement violated then the specific terms in this section that would cause such a license breach do not apply. Unless the third party, at its own discrtion, chooses to allow the specific violations under an agreement amendment. Violation of the license agreement means violation to the detriment of the interest of the third party and not violation to the detriment of Microsoft's interests. Additionally, Microsoft should proactively inform the Microsoft Internal Compliance Officer, the Technical Committee, and the Plaintiffs about the circumstances in question and provide, as priviledged communication and without violating the interests of the third party, all information required for their enforcement activities.

Comment III.24

Section III.H.2 (the first such section, there are two such sections in Section III.H) reads:

> "2. Allow end users (via a mechanism readily available from the desktop or Start menu), OEMs (via standard OEM preinstallation kits), and Non-Microsoft Middleware Products (via a mechanism which may, at Microsoft's option, require confirmation from the end user) to designate a Non-Microsoft Middleware Product to be invoked in place of that Microsoft Middleware Product (or vice versa) in any case where the Windows Operating System Product would otherwise launch the Microsoft Middleware Product in a separate Top-Level Window and display either (i) all of the user interface elements or (ii) the Trademark of the Microsoft Middleware Product."

These are the issues:

1. The text "require confirmation from the end user" should include statements that ensure that Microsoft will not act in a discriminatory or derrogatory manner in those confirmations. For example, Microsoft should not be allowed to include as part of that confirmation process: documentation, help, verbal communitation or any other means discriminatory or derrogatory

statements. Examples of such statemetns are: "By choosing this option, Microsoft voids the warranty of the product or disclaims its obligation to provide support. Microsoft has not tested this third party option, use at your own risk. Use of this option might cause data loss, corruption, etc." Microsoft has included messages in their products purposedly to cause third parties to not use non-Microsoft technology. The Windows 3.0 betas included messages similar to these when Windows realized that it was running on top of Digital Research's DR-DOS Operating System (instead of running on top of Microsoft's MS-DOS).

2. These statements: "launch the Microsoft Middleware Product in a separate Top-Level Window and display either (i) all of the user interface elements or (ii) the Trademark of the Microsoft Middleware Product." allow for Microsoft to easily subvert the intent by not Trademarking the Microsoft Middleware (while allowing compound Trademarks suchs as "Windows (R) Stuff"), by only showing all but one (1) of the user interface elements. The restriction to a separate Top-Level Window means that by providing it in a subwindow of an existing window on in a visually separate top level window that is controlled by a Microsoft non-separate or independent process, these escape clauses, again provide Microsoft with a a myriad ways to escape the intent of the clause. Additionally because of the software maleability the restriction to only Microsoft Middleware Products should not apply.

Section III.H.2 (the first such section, there are two such sections in Section III.H) should read:

> 2. Allow end users (via a mechanism readily available from the desktop or Start menu), OEMs (via standard OEM preinstallation kits), and Non-Microsoft software and technologies (via a mechanism which may, at Microsoft's option, require confirmation from the end user in a non-discriminatory and non-derrogatory manner) to designate a Non-Microsoft software or technologies to be invoked in place of any Microsoft Middleware, Microsoft Application or any Microsoft Operating System feature that existed in the market as a third party product prior to Microsoft's incorpration of such a feature into its Operating System (or vice versa) in any case where the Windows Operating System Product would otherwise launch the Microsoft Middleware Product, Microsoft Applications or any such Microsoft Operating System.

Comment III.25

Section III.H.3 allows for "(b) seek such confirmation from the end user for an automatic (as opposed to user-initiated) alteration of the OEM's configuration until 14 days after the initial boot up of a new Personal Computer". Such confirmation must be sought through non-discriminatory and non-derrogatory means (as outlined in Comment III.23). Additionally such confirmation from the end user must allow the user to reject the continued request for this confirmation by providing an easily visible checkbox that indicates: "would you like to be asked this question again in the future?" if the user doesn't want this question to be asked in the future it selects the checkbox and the question is never asked again (and the current settings remain unchanged).

Comment III.26

Section III.H.3.2 (the second such section, there are two such sections in Section III.H) reads:

> "2. that designated Non-Microsoft Middleware Product fails to implement a reasonable technical requirement (e.g., a requirement to be able to host a particular ActiveX control) that is necessary for valid technical reasons to supply the end user with functionality

consistent with a Windows Operating System Product, provided that the technical reasons are described in a reasonably prompt manner to any ISV that requests them."

Issues:

1. The "designated Non-Microsoft Middleware Product" term should be "designated Non-Microsoft software or technology".
2. Requirements to host a paricular ActiveX control must require that Microsoft proactively documents the interfaces of the particular ActiveX control, and doesn't prevent through signature or any other mechanism such hosting by the Non-Micorosft software or technology.
3. The "provided that the technical reasons are described in a reasonably prompt manner to any ISV that requests them" text shold read "Microsoft must pro-actively and broadly (through the MSDN program and web sites) describe the technical reasons reasonable manner." Any such "valid technical reasons" must be communicated to the Technical Committee, the Microsoft Internal Compliance Officer and the Plaintiffs.

Section III.H.3.2 (the second such section, there are two such sections in Section III.H) should read:

"2. that designated Non-Microsoft software or technology fails to implement a reasonable technical requirement (e.g., a requirement to be able to host a particular ActiveX control) that is necessary for valid technical reasons to supply the end user with functionality consistent with a Windows Operating System Product, provided that the technical reasons and detailed and complete technical documentation and mechanisms (component signatures) are described in a reasonably prompt manner to all ISVs through the MSDN program or its successor. Addionally the valid technical reasons and any other information relevant to the reasons must be communicated to the Technical Committee, the Microsoft Internal Compliance Officer,the Plaintiffs and the ISVs in question."

Comment III.27

The last paragraph of Section III.H.3 reads:

"Microsoft's obligations under this Section III.H as to any new Windows Operating System Product shall be determined based on the Microsoft Middleware Products which exist seven months prior to the last beta test version (i.e., the one immediately preceding the first release candidate) of that Windows Operating System Product."

Issues:

1. Again this is tied to Microsoft Middleware Prodcuts, it should be replaced by the broader term.
2. When a technology "exists" can lead to ambiguity given that Microsoft might dictate that technology doesn't exist until it determines (at its sole discretion) that it exists. This ambiguity is not required.

The last paragraph of Section III.H.3 should be removed completely. Microsoft can introduce new Microsoft Middleware, Microsoft Applications, Microsoft Technologies, Microsoft Hardware at any arbitrary point in time after the release of an Operating System product. In so far as those Microsoft technologies alter user's preferences and default system settings, saving and restoring those settings

sould be supported through an Operating System mechanism and user interface that allows for these settings to be manipulated.

Comment III.28

The first paragraphs of Section III.I reads:

> "I. Microsoft shall offer to license to ISVs, IHVs, IAPs, ICPs, and OEMs any intellectual property rights owned or licensable by Microsoft that are required to exercise any of the options or alternatives expressly provided to them under this Final Judgment, provided that"

The text "shall offer to license" requires that licensing be offered, it doesn't require that it actually enter into such license agreements. The text should instead read:

> I. Microsoft shall offer to license, and shall make its best effort to actually license, to ISVs, IHVs, IAPs, ICPs, and OEMs any intellectual property rights owned or licensable by Microsoft that are required to exercise any of the options or alternatives expressly provided to them under this Final Judgment, provided that

Comment III.29

Section III.I.1 reads:

> "1. all terms, including royalties or other payment of monetary consideration, are reasonable and non-discriminatory;"

Allowing for per unit royalties or prohibitive up front licensing fees might prevent Microsoft competitors from actually being able to participate competitibly in the relevant product markets. This Section III.I.1 should read instead:

> "1. all terms, are reasonable and non-discriminatory. Royalties or other payments of monetary consideration are explicitly forbidden from the terms when the intellectual property is to be used only for interoperation with a Microsoft Operating System product."

For example such a license would not require royalties from a server Operating System to interoperate with a Microsoft Operating System for Personal Computers, but if the server Operating System makes use of the licensed intellectual property to interoperate with non-Microsoft Operating Systems for Personal Computers, then a royalty might be required by Microsoft.

Comment III.30

Section III.I.2 reads:

> "2. the scope of any such license (and the intellectual property rights licensed thereunder) need be no broader than is necessary to ensure that an ISV, IHV, IAP, ICP or OEM is able to exercise the options or alternatives expressly provided under this Final Judgment (e.g., an ISV's, IHV's, IAP's, ICP's and OEM's option to promote Non-

Microsoft Middleware shall not confer any rights to any Microsoft intellectual property rights infringed by that Non-Microsoft Middleware);"

XXX

Comment III.31

Section III.I.3 reads:

> "an ISV's, IHV's, IAP's, ICP's, or OEM's rights may be conditioned on its not assigning, transferring or sublicensing its rights under any license granted under this provision;"

Not allowing the transferring or assignment of these parties rights under certain circumstances, for example under an acquisition, is inherently a form of discrimination. Given that the licenses are to be offered in a non-discriminatory fashion, it is important that such licenses once offered be available in the future and that the licensing not be restricted to a given period of time. If subsequent versions of technology become available, and new licenses are developped for that technology, the older licenses to the earlier technology should continue to be offered for the earlier verisions of the technology.

Comment III.32

The paragraphs immediately after Section III.I.5 reads:

> "Beyond the express terms of any license granted by Microsoft pursuant to this section, this Final Judgment does not, directly or by implication, estoppel or otherwise, confer any rights, licenses, covenants or immunities with regard to any Microsoft intellectual property to anyone."

XXX

Comment III.33

Section III.J.2.b reads:

> "that the licensee:
> ....
> (b) has a reasonable business need for the API, Documentation or Communications Protocol for a planned or shipping product,"

Microsoft shall not unreasonably dispute the licensee's assertions with respect to III.J.2.b, any individual member of the Technical Committee through direct communication with the prospective licensee can make a positive determination about the III.J.2.b requirement and inform Microsoft about its determination without any further Microsoft argument, dispute or delay about the prospective licensee meeting the III.J.2.b requirement (Court intervention shall not be required).

Section III.J.2.b should read:

> (b) has a reasonable business need (as promptly and in a non-discriminating manner

determined by Microsoft or any one individual member of the Technical Committee), for the API, Documentation or Communications Protocol for a planned or shipping product

Comment III.33

Section III.J.2.b reads:

"that the licensee:
....
(c) meets reasonable, objective standards established by Microsoft for certifying the authenticity and viability of its business"

It should instead read:

(c) meets reasonable, objective and non-discriminatory standards (proposed by Microsoft and promptly approved by the Technical Committe in consultation with the Plaintiffs) for certifying the authenticity and viability of its business, the actual determination of the actual authenticity and viability of the business can be made by Microsoft or any one member of the Technical Committee after taking into consideration legal consultation from the Technical Committee's legal staff

Comment III.34

Section J.2.d reads:

"that the licensee:
....
(d) agrees to submit, at its own expense, any computer program using such APIs, Documentation or Communication Protocols to third-party verification, approved by Microsoft, to test for and ensure verification and compliance with Microsoft specifications for use of the API or interface, which specifications shall be related to proper operation and integrity of the systems and mechanisms identified in this paragraph."

The issues are:

1. Should be at Microsoft's expense, not the licensee's.
2. Verification should bot be performed by "third-party verification, approved by Microsoft" if such verification is required by Microsoft it should be done under staff hired by the Technical Committee and at Microsoft's expense and not through unknown for profit relationships and agreements between a third party and Microsoft. The intent of this section is for "proper operation and integrity of the systems and mechanisms", Microsoft should be satisfied with the Technical Committee staff performing these duties unless its goals are other than those expressed herein.
3. The text "to test for and ensure verification and compliance with Microsoft specifications for use of the API or interface, which specifications shall be related to proper operation and integrity of the systems and mechanisms identified in this paragraph" refers to to a "Microsoft specifications for use of the API or interface", these specifications shall be made available to

the licensee.

Section J.2.d should read:

> (d) agrees to submit, at Microsoft's expense, any computer program using such APIs, Documentation or Communication Protocols to the Technical Committe for verification, to test for and ensure verification and compliance with Microsoft specifications (which Microsoft shall make available to the licensee) for use of the API or interface, which specifications shall be related to proper operation and integrity of the systems and mechanisms identified in this paragraph.

Comment IV.1

Section IV.A.2.a reads:

> "a. Access during normal office hours to inspect any and all source code, books, ledgers, accounts, correspondence, memoranda and other documents and records in the possession, custody, or control of Microsoft, which may have counsel present, regarding any matters contained in this Final Judgment."

This should be expanded to include electronic forms of communication in electronic form, not printed form, because it is extremely hard to sift through information, such as source code, in non-electronic form.

Section IV.A.2.a should read:

> a. Access during normal office hours to inspect any and all source code, source code control systems, bug or defect databases, design documents, build procedures, binary codes, books, ledgers, electronic ledgers, electronic databases, accounts, correspondence, memoranda, newsgroups, discussions forums, web sites and other documents and records in the possession, custody, or control of Microsoft, which may have counsel present, regarding any matters contained in this Final Judgment. Access to electronic forms of information shall be provided in electronic form and not in only in printed form.

Comment IV.2

Section IV.B.2 describes "The TC members shall be experts in software design and programming." section IV.B.2.c reads:

> "c. shall perform any other work for Microsoft or any competitor of Microsoft for two years after the expiration of the term of his or her service on the TC."

Given that Microsoft competes in almost every software market conceivable, it is a strecth to request two years of non-compete agreement from the TC member. Two such years of non-compete could be provided only if Microsoft provides two such years of salary to the TC member with a yearly inflationary bonus adjustment per year.

Comment IV.3

Section IV.B.8.iii reads:

> "(iii) obtain reasonable access to any systems or equipment to which Microsoft personnel have access;"

This should reads:

> (iii) obtain reasonable access to any systems, services or equipment to which Microsoft personnel have access; services should include but not be limited to: authentication, file sharing, discussion forums, newsgroups, chat channels, source code control systems, bug/defect database systems, design management systems, document repositories, web sites, etc.

Comment IV.4

Section IV.D.4.d reads:

> "d. No work product, findings or recommendations by the TC may be admitted in any enforcement proceeding before the Court for any purpose, and no member of the TC shall testify by deposition, in court or before any other tribunal regarding any matter related to this Final Judgment."

This is one of the most egregious terms of the settlement. Given that the Technical Committee has hardly any actual enforcement duties, other than monitoring, and the Technical Committee actually being an impartial participant in the actual history of Microsoft's interaction with third parties and Microsoft's possible violations of settlement terms, it is astonishing that this term mandates that the actual work product of the Technical Committee not be admissible as evidence of the settlement enforment activities.

Microsoft deifnitely over-reached by requesting this, this shows Microsoft's true intentions (another 5 years without actual enforcement plus maybe another 5 of further litigation), Microsoft should be forced to accept instead the contrary of this term.

It is an interesting legal question if any documents related to presummed antitrust violations are made the work product of the Technical Committee, then by IV.D.4.d and those documents being un-admissible, then what other documents could be used to initiate Court proceedings by the plaintiffs without any such documents being alleged by Microsoft as being derived from the TC's un-admissible work. How could the plaintiffs promptly produce equivalent analysis without it being under this gag order?

Section IV.D.4.d must read:

> "d. All work product, findings or recommendations by the TC must be admitted in any enforcement proceeding before the Court for any purpose, and any member of the TC is herein explicitly allowed to testify by deposition, in court or before any other tribunal regarding any matter related to this Final Judgment."

If the Plaintiffs are not willing to mandate this rewritten IV.D.4.d they are engaging in blatant

dereliction of duty of the antitrust enforcement offices and duties that they purport to serve.

Comment IV.5

Section IV.D.4.e reads:

> "e. The TC may preserve the anonymity of any third party complainant where it deems it appropriate to do so upon the request of the Plaintiffs or the third party, or in its discretion."

It should read instead:

> "e. The TC must preserve the anonymity of any third party complainant upon the request of the Plaintiffs or the third party. Where the TC deems it appropriate to do so, and it has not ben requested, by the Plaintiffs or the third party, the TC in its own discretion it may preserve the anonymity of any third party complainant."

Comment V.1

Section V.A reads:

> "A. Unless this Court grants an extension, this Final Judgment will expire on the fifth anniversary of the date it is entered by the Court."

The Final Judgement should last longer than five years. The actual initial antritrust violations by Microsoft occured more than five years ago and we are still without any form of remedy. The legal system works very slowly. By entering this Final Judgement, and Microsoft continuing its anti-competitive practices, it would probably take more than five years to resolve those further complaints. Given that the orignal D.O.J. vs Microsoft settlement that related to per computer unit licensing was ambiguous enough that it ended up being mostly ignored and full antritrust proceedings were required, it wouldn't surprise me if this agreement which is even more ambiguous and has many more loopholes means at Microsoft's disposal to circumvent its intent would not result in many more years of litigation without any real behaviour change on Microsoft's part.

Mandating an expiration only after Microsoft no longer has monopoly power in the market of Operating Systems for Personal Computers for Intel x86 or x86 compatible systems is more appropriate. Court proceedings or the under the parties agreement and Court supervision would be required for the settlement to expire. Otherwise a period longer than 5 years, at least 12 years should be mandated.

It must be observed how durable has Microsoft's monopoly been and that it was initially cemented through antitrust violations for which a Final Judgement with no teeth got the industry into its current state:

1. Since the mid 80s it faced no competition. Through illegal competitive behaviour, it foreclose the market to then Digital Research's DR-DOS product (an atlernative to Microsoft's MS-DOS). Microsoft has recently settled a separate antitrus suit by the current owner of the DR-DOS assets (Caldera). These original violations animated the first consent decreed between D.O.J. and Microsoft 1995. That consent decree was determined to be ambiguous by the

appellate Court in its allowance of integration, and a full antitrust lititgation ensued.

2. Even though Microsoft's technology significantly lagged behind the technical abilities of the systems (for example it took Microsoft 10 years to produce a quasi 32 bit operating system after x86 Intel 32 bit capable operating systems became available in the market) no other competitors could enter the market because Microsoft moved from per-unit licenses to per-system licenses for each model of system that the OEM manufactured (and this continued to exclude other vendors from the market).
3. The one significant threat that Microsoft has faced to its personal computer operating system monopoly has been the advent of the Internet with open standards and as a means for delivering applications from server computers (either through Java or directly as web applications) or through middleware based applications that could perform on Microsoft Operating System based personal computers or personal computers running other operating systems. This one threat has been completely erradicated from the market. Microsoft will continue to exclude Java as a viable Internet based application delivery mechanisms, because this Final Judgement doesn't mandata the allowance of interoperability of Sun's Java with Microsoft's Internet Explorer (the Top Level Window definition is purposedly design to make this impossible).

Dereliction of duty now from the Plaintiffs would mean that even under the most blatant violations of antritrust laws and astonishing findings of fact, that Microsoft would escape with a Final Judgement that is too short and very weak from many perspectives. 12 years of enforcement seem the minimal time for market conditions to actually have another opportunity to arise and for actual market change to actually occur.

Comment V.2

Section V.B reads:

> "B. In any enforcement proceeding in which the Court has found that Microsoft has engaged in a pattern of willful and systematic violations, the Plaintiffs may apply to the Court for a one-time extension of this Final Judgment of up to two years, together with such other relief as the Court may deem appropriate."

The Plaintiffs in any enforcement proceeding shall not be limited to only one extension of two years. If the Plaintiffs cannot request as a remedy to future Microsoft's violations of this settlement, then it is not clear if the Court can actually mandate a remedy that is not being requested. Additionally, limiting the length of the actual extension at this time and as part of this settlement seems beyond belief given that any enforcement will require the Court participation because there is no actual real enforcement (other than monitoring by the Technical Committee with its work product later bein un-admissible as court evidence and without the TC members being allowed as witnesses).

Section V.B should read:

> B. In any enforcement proceeding in which the Court has found that Microsoft has engaged in a pattern of willful and systematic violations, the Plaintiffs may apply to the Court for an extension of this Final Judgment for up to ten years, together with such other relief as the Court may deem appropriate, which is hereby agreed by the parties that it is acceptable for it to be of any length as the Court deems appropriate.

Comment VI.1

Definition VI.A reads:

> 'A. "Application Programming Interfaces (APIs)" means the interfaces, including any associated callback interfaces, that Microsoft Middleware running on a Windows Operating System Product uses to call upon that Windows Operating System Product in order to obtain any services from that Windows Operating System Product.'

Issues are:

1. API refers to the interfaces that are used not only by Microsoft Middleware uses, but any other software uses. APIs are mostly used by regular applications, narrowing the definition of APIs to what Microsoft Middleware uses is a contorted way to allow even more freedoms of circumvention to Microsoft. For example for Microsoft to perform anti-competitive practices through undocumented interfaces that its applications use, but that Microsoft's Middleware doesn't use, thus excluding those APIs (by definition!) from being covered by this settlement. Amazingly, this definition proposed to define API to mean something other than Application Programmin Interface, do you see the word application? It is not Middleware Programming Interface! Simply amazing!

Definition VI.A should be replaced by the definition in the Final Judgement entered by Judge Jackson (definition 7.b):

> A. "Application Programming Interfaces (APIs)" means the interfaces, service provider interfaces, and protocols that enable a hardware device or an application, Middleware, or server Operating System to obtain services from (or provide services in response to requests from) Platform Software in a Personal Computer and to use, benefit from, and rely on the resources, facilities, and capabilities of such Platform Software.

If another definition is adopted, it should be explained why it is different from the one proposed.

Comment VI.2

Definition VI.B reads:

> 'B. "Communications Protocol" means the set of rules for information exchange to accomplish predefined tasks between a Windows Operating System Product and a server operating system product connected via a network, including, but not limited to, a local area network, a wide area network or the Internet. These rules govern the format, semantics, timing, sequencing, and error control of messages exchanged over a network.'

Issues:

1. Given that Communication Protocols relevant to this settlement (given the proposed changes in other sections) also exist between two personal computers, the definition should reflect that.
2. The set of tasks between the parties in a protocol doesn't have to be predefined, there are protocols under which the parties actually sent pieces of arbitrary code to each other to perform actions that are arbitrary.

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Definition VI.B should read:

'B. "Communications Protocol" means the set of rules for information exchange to accomplish tasks between a Windows Operating System Product and another operating system connected via a network, including, but not limited to, a local area network, a wide area network or the Internet. These rules govern the format, semantics, timing, sequencing, and error control of messages exchanged over a network.'

Comment VI.3

Definition VI.J reads:

'J. "Microsoft Middleware" means software code that

1. Microsoft distributes separately from a Windows Operating System Product to update that Windows Operating System Product;
2. is Trademarked;
3. provides the same or substantially similar functionality as a Microsoft Middleware Product; and
4. includes at least the software code that controls most or all of the user interface elements of that Microsoft Middleware.

Software code described as part of, and distributed separately to update, a Microsoft Middleware Product shall not be deemed Microsoft Middleware unless identified as a new major version of that Microsoft Middleware Product. A major version shall be identified by a whole number or by a number with just a single digit to the right of the decimal point.'

This is a very astonishing definition of Middleware, nowhere does it talk about software that provides APIs to other software components, which is core to any definition of Middleware. The definition of Non-Microsoft Middleware (VI.M) does seem appropriate to what Middleware is. Definition 7.q in Judge Jackson's Final Judgement should be seen for a reasonable defintion of Middleware:

'"Middleware" means software that operates, directly or through other software, between an Operating System and another type of software (such as an application, a server Operating System, or a database management system) by offering services via APIs or Communications Interfaces to such other software, and could, if ported to or interoperable with multiple Operating Systems, enable software products written for that Middleware to be run on multiple Operating System Products. Examples of Middleware within the meaning of this Final Judgment include Internet browsers, e-mail client software, multimedia viewing software, Office, and the Java Virtual Machine. Examples of software that are not Middleware within the meaning of this Final Judgment are disk compression and memory management.'

These notions in the VI.J "Microsoft Middleware" definition are astonishing:

- "2. is Trademarked;" other than to provide Microsoft another escape clause, this term adds absolutely no value. With this term as part of the definition, Microsoft can rename some

component, not use an earlier trademark name for it, and voila! it is no longer Microsoft Middleware.

- The notion of what Microsoft Middleware is certainly cannot be tied to the version number given to it! Something is what it is whatever the name used to refer to it. Something as arbitrary as a version number and as easily maleable as a version number certainly cannot be criteria to be used to determine what it is. Contract writting 101 should certainly tech any lawyers about this. It is interesting to pose these questions to the Plaintiffs:
  - What is the major version number of Office XP ? What is the version number of Internet Explorer.NET ? What is the version number of Outlook Express.NET ? What is the version number of Windows XP, Windows CE, Windows ME, Winodows 95 OSR2 ? Widonws 95?

Microsoft certainly can change interfaces, protocols, APIs, etc in a major, minor, service pack, hot fix, or any other packaging of its software. The names or version numbers of such software should not be used to determine what is contained by them.

Both of these (VI.J.2 and VI.J last paragrpah) should be removed from the definition.

The term VI.J.4 seems to be there only for the purpose of allowing Microsoft to slice and recombine its software in such a way as to ensure that the user interface component be the one called the "Microsoft Middleware" and not the components that acutally perfrom the traditional Middleware functionality (see Jacksons definition above) of providing APIs to other software. It is very intereseting that Middleware is mostly not about user interfaces but about providing interfaces to other applications, applications that relly on the Middleware as a platform. Most Midleware doesn't have a user interface, if it has one it is incidental.

The term VI.J.4 should be removed.

After these adjustments, Defintion VI.J should just be:

J. "Microsoft Middleware" means software code that

1. Microsoft distributes separately from a Windows Operating System Product to update that Windows Operating System Product; and
2. provides the same or substantially similar functionality as a Microsoft Middleware Product; and

Comment VI.4

Definition VI.K reads:

K. "Microsoft Middleware Product" means

1. the functionality provided by Internet Explorer, Microsoft's Java Virtual Machine, Windows Media Player, Windows Messenger, Outlook Express and their successors in a Windows Operating System Product, and
2. for any functionality that is first licensed, distributed or sold by Microsoft after the entry of this Final Judgment and that is part of any Windows Operating System Product

a. Internet browsers, email client software, networked audio/video client software, instant messaging software or
b. functionality provided by Microsoft software that —

i. is, or in the year preceding the commercial release of any new Windows Operating System Product was, distributed separately by Microsoft (or by an entity acquired by Microsoft) from a Windows Operating System Product;
ii. is similar to the functionality provided by a Non-Microsoft Middleware Product; and
iii. is Trademarked.

Functionality that Microsoft describes or markets as being part of a Microsoft Middleware Product (such as a service pack, upgrade, or bug fix for Internet Explorer), or that is a version of a Microsoft Middleware Product (such as Internet Explorer 5.5), shall be considered to be part of that Microsoft Middleware Product.'

The first issue with this definition is, what is the connection between VI.K.2 and the presumably subordinate VI.K.2.a and VI.K.2.b ? The sentence under VI.K.2 seems incomplete, it should end in something like :

"... and that is part of any Windows Operating System Product, and is either:"

Other issues are:

1. Throughout the trial Microsoft and depositions (but not before litigation was brought into action) would not budge on its pretense incomprehension of **what an Internet Browser is**. They would only talk about **browsing technologies** but would react stupified to the notion of Internet Browsers, particularly their own, when they were referred to as "the browser product." It is amusing and without any sign of legal thouroughness that the Plaintiffs have come to agree with Microsoft to a definition that uses the term "Internet browser" without actually providing a definition for such a term anywhere in the proposed Final Judgement. Not even what a **Internet Browser** is being agreed amongst the parties in the dereliction of duty that this document embodies.
2. Given that this section includes other disputed terms such as Internet Explorer, it sould seem to be important to include precise definitions about what these actual terms mean. Maybe when the Plaintiffs try to do this together with Microsoft they will realize that only contorted definitions such as the ones for API, Microsoft Middleware, Microsoft Middleware Product, etc. are arrived at.
3. Again software can be or stop from being a Microsoft Middleware Product depending on whether it is trademarked or not (which to no ones surprise is another contorted and unnatural definition by itself).
4. VI.K.2.b.i refers to "distributed separately by Microsoft from a Windows Operating System Product", that term should be precisely defined to mean what it seems to mean, because Microsoft having argued in court that a sandwich is part of Windows if they soley dictate so,

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then they surely would say that any code "is distributed as part of a Windows Operating System" even if the code is sent to the end user in a CD-ROM inside a sandwich not included in the Windows box, or more complexily and seriously, if it is sent to the user's system through a the Windows update process.

5. VI.K.2 seems to require that the functionality be "part of any Windows Operating System Product" but immediately and sub-ordinated to that clause it also says VI.K.2.b.i "distributed separately by Microsoft from a Windows Operating System Product" which seems to contradict the pre-requisite governing condition (it has to be both part of and not part of?), that would be by necessity the empty set, because something cannot be both part of something and not part of something; thus redering the whole contorted VI.K definition sense-less.
6. The final paragraph on VI.K states that:

> 'Functionality that Microsoft describes or markets as being part of a Microsoft Middleware Product (such as a service pack, upgrade, or bug fix for Internet Explorer), or that is a version of a Microsoft Middleware Product (such as Internet Explorer 5.5), shall be considered to be part of that Microsoft Middleware Product.'

as some form of saving grace for the grotesquely constructed prior definition. Obviously, since the litigation started, Microsoft has described everything as part of Windows, so one should not wait standing for Microsoft to ever again market anything in their anti-competitive campaigns as not being part of Windows.

Definition VI.K should be replaced by:

'K. "Microsoft Middleware Product" means

1. the functionality provided by Internet Explorer, Microsoft's Java Virtual Machine, Windows Media Player, Windows Messenger, Outlook Express and their successors in a Windows Operating System Product, and
2. any functionality that is first licensed, distributed or sold by Microsoft before, on, or after the entry of this Final Judgment and that is later made part of any Windows Operating System Product, this shold include but not be limited to: Internet browsers, email client software, networked audio/video client software, instant messaging software; or
3. functionality provided by Microsoft software that—

    i. is, or at any time preceding the commercial release of any new Windows Operating System Product was, distributed separately by Microsoft (or by an entity acquired by Microsoft) from a Windows Operating System Product; or
    ii. is similar to the functionality provided by a Non-Microsoft Middleware Product

Functionality that Microsoft describes or markets as being part of a Microsoft Middleware Product (such as a service pack, upgrade, or bug fix for Internet Explorer), or that is a version of a Microsoft Middleware Product (such as Internet Explorer 5.5), shall be considered to be part of that Microsoft Middleware Product.'

Additionally, reasonable definitions of what these mean should be included as separate definitions: "Internet Explorer, Microsoft's Java Virtual Machine, Windows Media Player, Windows Messenger, Outlook Express and their successors in a Windows Operating System Product"

Comment VI.5

The word product should be replaced by technology in definition VI.M because not all middleware is made available in a product form, some of it might be made freely available or under conditions or packaging that don't relate directly to it being a product:

> 'M. "Non-Microsoft Middleware" means a non-Microsoft software product running on a Windows Operating System Product that exposes a range of functionality to ISVs through published APIs, and that could, if ported to or made interoperable with, a non-Microsoft Operating System, thereby make it easier for applications that rely in whole or in part on the functionality supplied by that software product to be ported to or run on that non-Microsoft Operating System.'

It shold read:

> 'M. "Non-Microsoft Middleware" means a non-Microsoft software technology running on a Windows Operating System Product that exposes a range of functionality to ISVs through published APIs, and that could, if ported to or made interoperable with, a non-Microsoft Operating System, thereby make it easier for applications that rely in whole or in part on the functionality supplied by that software product to be ported to or run on that non-Microsoft Operating System.'

Comment VI.6

The requirement under VI.N.ii that:

> 'and (ii) of which at least one million copies were distributed in the United States within the previous year.'

Seems excessive, a more reasonable number of one hundred thousand copies is more appropriate because the benefits of the settlement can benefit nascent technologies and not just more established ones.

Comment VI.7

The definition under VI.O of OEM is self centered, to be an OEM, the OEM has to be a licensee of a Windows Operating System Product. How do new OEMs come to be if Microsoft refused to license its products directly or uses intermediaries not under its ownership control but under agreement control to do actual sublicensing? The definition of an OEM should be independent of whether they at any given point in time they have a direct license from Microsoft (instead of purchasing the product in the channel like smaller OEMs do). The definition of Covered OEM already takes care of them being licensees.

'O. "OEM" means an original equipment manufacturer of Personal Computers that is a licensee of a Windows Operating System Product.'

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Should be:

O. "OEM" means an original equipment manufacturer of Personal Computers.

Comment VI.8

Definition VI.Q reads:

'Q. "Personal Computer" means any computer configured so that its primary purpose is for use by one person at a time, that uses a video display and keyboard (whether or not that video display and keyboard is included) and that contains an Intel x86 compatible (or successor) microprocessor. Servers, television set top boxes, handheld computers, game consoles, telephones, pagers, and personal digital assistants are examples of products that are not Personal Computers within the meaning of this definition.'

The only concern here is if:

television set top boxes, handheld computers, game consoles, telephones, pagers, and personal digital assistants

are constructed from Intel x86 or x86 compatible processors and Microsoft offers a version Windows for them that allows any software designed for Personal Computers to work on those systems, then what those products would be are:

- x86 Personal Computer based handheld personal computers; or
- x86 Personal Computer based personal digital assistants; or
- x86 Personal Computer based personal game consoles; etc

For example today Microsoft offers a fully functional Personal Computer as its game console, the Microsoft Xbox. If Microsoft were to offer Windows XP for that system, it would not only be a game console but also a fully function Personal Computer. Under those circumstances it should not be excluded from the definition.

Comment VI.9

Defintion VI.R reads:

'R. "Timely Manner" means at the time Microsoft first releases a beta test version of a Windows Operating System Product that is distributed to 150,000 or more beta testers.'

Without actual evidence about the actual size of the MSDN subscription base, it seems safer to rewrite this. Addtionally because of naming issues, the term "beta test version" should be expandded into its meaning:

'R. "Timely Manner" means at the time Microsoft first releases a release version of a Windows Operating System Product through its MSDN developper program solely for the purpose of developper testing and not intended for end user use for reasons other than for testing. If Microsoft plans multiple such test releases, then Timely Manner shall means the release time of a test release that is at least one year away from the product's

final availabilty to OEMs for pre-installation or for consumer retail purchasc, whichever is earlier.'

Comment VI.10

Defintion VI.S reads:

'S. "Top-Level Window" means a window displayed by a Windows Operating System Product that (a) has its own window controls, such as move, resize, close, minimize, and maximize, (b) can contain sub-windows, and (c) contains user interface elements under the control of at least one independent process.'

This definition is purposedly constructed to prevent:

1. An alternative Jave Virtual Machine (for example from Sun Microsystems) from being invoked when Java Applets are invoked through a web page because the window controls are the window controls of the Internet Browser and the Java Applet executes within the same window. By Microsoft using this defitintion to condition where it allows non-Microsoft Middleware to be invoked it controls the most important way for Java application execution (i.e. under a more complex web based application). Thus Microsoft having killed Netscape Navigator's viability proceeds to deny Java the remaining vehicle that it could have enjoyed under this settlement, i.e. under Internet Explorer. Of course the Plaintiffs do nothing other than acquesce under this settlement either because of dereliction of duty or blatant technical misunderstanding of the issues involved.
2. For example, the "live chart" stock quotes provided (through Java applets) by www.quote.com or the Chess application provided (Java applet) by www.chessclub at

    - http://www.chessclub.com/interface/java.html
    - http://queen.chessclub.com/sji/index.html

    Would simply continue to run under Microsoft Java Virtual Machine and not under Sun's Java Virtual Machine when installed on the same system and with all the provisions of the settlement fully implement (and without any Microsoft violation of the terms whatsoever).
    Thus Microsoft gets to reap the fruits of its anti-competitive camapaign without having actually conceeded anything of substance for non-Microsoft Middleware as it relates to Microsoft's Internet Explorer. The same will occur with network video and audio formats because Microsoft will make its players not start on a Top Level Window thus taking control of audio and video formats of Real Networks players even when the end user has choosen otherwise under the provisions of this agreement.

The notion of Top Level Window must be extricated from the settlement and Microsoft should allow invocation of ActiveX based components of the non-Microsoft Middleware under all circumstances, in a manner similar under which today third party software is invoked under a non Top Level Window and displayed within the Internet Explorer window without a problem (for example see how Adobe's Acrobat Reader is displayed under a non-Top Level Window). Microsoft has done already all the technical work in this area, an it is now only putting contractual road blocks to all these natural forms of invocation of non-Microsoft Middleware.

Comment VI.10

Definition VI.T reads:

> 'T. "Trademarked" means distributed in commerce and identified as distributed by a name other than Microsoft® or Windows® that Microsoft has claimed as a trademark or service mark by (i) marking the name with trademark notices, such as ® or □, in connection with a product distributed in the United States; (ii) filing an application for trademark protection for the name in the United States Patent and Trademark Office; or (iii) asserting the name as a trademark in the United States in a demand letter or lawsuit. Any product distributed under descriptive or generic terms or a name comprised of the Microsoft® or Windows® trademarks together with descriptive or generic terms shall not be Trademarked as that term is used in this Final Judgment. Microsoft hereby disclaims any trademark rights in such descriptive or generic terms apart from the Microsoft® or Windows® trademarks, and hereby abandons any such rights that it may acquire in the future."

The main issue throughout this proposed settlement with respect ot Trademarks is that software is what it is irrespective of what it is called. The definitions of Microsoft Middleware and Microsoft Middleware Product where conditioned with them being trademarked (under this definition) as a means to provide Microsoft and escape clause to make the no longer Microsoft Middleware (and Microsoft Middleware Products). That concept should completely go away. If it doesn't then the defintion of Trademarked shold be exactly the legal defintion understood under the law and not this one.

Comment VI.11

Defitions VI.U reads:

> 'U. "Windows Operating System Product" means the software code (as opposed to source code) distributed commercially by Microsoft for use with Personal Computers as Windows 2000 Professional, Windows XP Home, Windows XP Professional, and successors to the foregoing, including the Personal Computer versions of the products currently code named "Longhorn" and "Blackcomb" and their successors, including upgrades, bug fixes, service packs, etc. The software code that comprises a Windows Operating System Product shall be determined by Microsoft in its sole discretion.'

The list must also include Windows 95, Windows 98, Windows SE, Windows ME (collectively known as Windows 9x) and Windows NT 4.0 and all their service releases. The current installed base is mostly made out of these products. By purposedly excluding them Microsoft and the Plaintiffs allow Microsoft to continue to prevent non-Microsoft Middleware from fairly competing in the broad installed base and forces competition to only occur under Microsoft's controlled evolution of the market. It does so by not allowing competition from the broad installed base by not affording the benefits of the settlement to that gigantic installed base (i.e. all the versions of Windows 9x).

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